MALAYSIAN REPORTS

KONG MING BANK BERHAD v. LEONG HO YUEN

[F.C. (Lee Hun Hoe C.J. (Borneo), Syed Othman and Abdul Hamid F.JJ.) October 12, 1981; February 19, 1982]

[Kuching – Federal Court Civil Appeal No. 7 of 1981]

Contract – Whether contract of guarantee – Contracts Act, 1950, s. 79.

Banking – Overdraft – When interest payable – Construction of memoranda of charges.

Interpretation – Interpretation of deed – Contra proferentem rule.

In this case in consideration of the appellant bank giving a company, the Sarawak Vanguard Limited, overdraft facilities up to $45,000.00, the respondent executed a memorandum of charge over his ½ undivided share and interest in a piece of land in Kuching. Subsequently the amount secured was increased to $60,000.00 and then to $85,000.00 and memoranda of charges were executed accordingly. The bank asked for payment of the amount due under the charges as at April 30, 1979 which it claimed amounted to $163,176.83 and subsequently brought an application for the sale of the respondent's undivided share and interest in the land and for payment from the proceeds of sale of the amount claimed. The respondent objected to the application stating in effect that his right of redemption extended only to paying $85,000.00 plus interest from the date of demand till date of full settlement. Neither the company nor the respondent had paid anything to the bank.

The learned trial judge ruled that the respondent was to repay on demand the balance for the time being due owing (i) in respect of advances of various types up to the total limit of $85,000.00 and (ii) in respect of interest plus bank charges and conversion as from September 28, 1979, the date on which the bank made the demand for payment.

The appellant appealed.

Held: (1) the present case was not a contract of guarantee. The promise to pay was made by the respondent in consideration of the bank granting accommodation to the company and the respondent was not in the position of a surety or guarantor. In any event it is now settled law that guarantees are not to be construed in any different way from any other contract;

(2) the charges in the present case can be construed in accordance with their expressed intention. So construed it was clear that interest became payable on sums from time to time they were drawn and sums became payable when they were drawn;

(3) the respondent was therefore responsible to pay the bank for (i) the principal sum under the charges, that is, $85,000.00, (ii) interest at 12% per annum calculated on daily balances with monthly rest from the date of utilisation of overdraft facilities by the company and (iii) interest from the date of demand till date of settlement.

Cases referred to:

(1) *Oriental Bank of Malaya Ltd.* v. *N. Subramanian* [1958] M.L.J. 35, 38.
(2) *Lloyd's* v. *Harper* 16 Ch. D. 290.
(3) *Eshelby* v. *Federated European Bank Ltd.* [1932] 1 K.B. 254.
(4) *Nicholson* v. *Paget* (1832) 1 C. & M. 48, 2 L.J. (Ex.) 18; 149 E.R. 309.
(5) *Blest* v. *Brown* (1862) 4 De G.F. & J. 367, 376; 45 E.R. 1225.
(6) *Malayan Banking Bhd.* v. *Tan Fong Guan & Ors.* [1975] 2 M.L.J. 49.
(7) *Throckmerton* v. *Tracy* (1855) 1 Plowd. 145; 75 E.R. 222.
(8) *Neill* v. *Duke of Devonshire* (1882) 8 A.C. 135.
(9) *Borradaile* v. *Hunter* (1843) 5 Man. & G. 639; 134 E.R. 715.
(10) *Edwards* v. *Marston* [1891] 1 Q.B. 225.
(11) *Reynolds* v. *Commissioner of Income Tax for Trinidad and Tobago* [1965] 3 All E.R. 901

FEDERAL COURT.

Wong Chong Wah (Maria Perpetua Kana with him) for the appellant.

J.C. Fong for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the Judgment of the Court): The only question to be determined in this appeal is whether on the construction of memoranda of charges, the appellant bank is entitled to charge interest as soon as money in an overdraft facility is drawn, as contended by the chargee appellant (the bank), or from the date of demand as contended by the chargor (the respondent) and accepted by the learned trial Judge.

On April 17, 1970 in consideration of the bank granting the Sarawak Vanguard Limited, now known as the Sarawak Vanguard Sendirian Berhad, Kuching (the Company), overdraft facilities up to $45,000.00, the respondent executed a memorandum of charge over his ½ undivided share and interest in a piece of land and building at Padungan, Kuching, Sarawak, Parcel 138 section 50 Kuching Town Land District held under Kuching Lease of Crown Land No. 4572 of 1956. On December 31, 1970 by a memorandum of increase of amount owing under the charge the amount to be secured was increased to $60,000.00. On July 30, 1973 a second memorandum of charge was executed over the same title granting a further overdraft facility of $250,000. On September 28, 1979 the bank wrote to the respondent drawing his attention to the overdraft facility of $85,000.00 to the Company, demanding full payment of $163,176.83 owing under the charges as at April 30, 1979 together with further interest thereon at 12% per annum, and informing him that if he failed to comply with the notice a court order would be sought to sell the security. On December 18, 1979 an application by way of originating summons was made to the court for sale of the respondent's ½ undivided share and interest in the land and for payment from the proceeds of sale in the sum claimed together with interest at 12% per annum from May 1, 1979 to the date of sale of the land. The respondent objected to the application, stating in effect that his right of redemption under section 145 (1) of the Land Code extended only to paying $85,000.00 plus interest from the date of demand till date of full settlement as indicated in his advocate's letter of August 21, 1980. It does not appear to be disputed that neither the Company nor the respondent has paid anything to the bank.

We shall deal first with the contention on behalf of the respondent that as he is merely the guarantor for the Company, the court in construing a contract of guarantee should give it a lighter construction. Reference is made to *Oriental Bank of Malaya Ltd.* v. *N. Subramanian*(1) where Whyatt C.J. (Singapore) relying on a statement by Fry J. in *Lloyd's* v. *Harper*(2) said:

"A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used but also with regard to the surrounding circumstances".

This statement does not bear out the proposition that a contract of guarantee is to be construed favourably to the guarantor. It is now settled law that guarantees are not to be construed in any different way from any other contract. See *Esheby* v. *Federated European Bank Ltd.*,[3] *Nicholson* v. *Paget*[4] and *Blest* v. *Brown*.[5]

In any event, we do not see the present case as a contract of guarantee. A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. See section 79 of the Contracts (Malay States) Ordinance, 1980. The respondent by the charges is not in the position of surety or guarantor who engages with the bank to be answerable in the second degree for the default of the Company. The promise to pay is made by the respondent in consideration of the bank granting accommodation to the Company. All the indications are that the respondent is related to the Company. The address of the respondent is the same as that of the Company.

As to the effect of the charges, in argument in the trial court and before us, both sides have referred to the Privy Council case of *Malayan Banking Bhd.* v. *Tan Fong Guan & Ors.*,[6] each side contending that the authority favours his argument. This case relates to a memorandum of a charge under the Johore Enactment. The operative part of the charge is as follows:

"Do hereby charge the said land for the benefit of the Bank with the repayment on demand of the balance which on the account between me and the Bank shall for the time being be owing in respect of cheques, bills or drafts drawn, ... up to the limit of Dollars Thirty five thousand only ($35,000/–) for principal and for interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges," .....

Lord Cross of Chelsea (delivering the judgment of the Board) said at p.50:

"On their appeal to the Board counsel for the appellant conceded – rightly as their Lordships think – that the wording of the operative part of the charge is ambiguous. It may be read as saying that the land is charged with repayment on demand of the balance for the time being owing (A) in respect of advances of various types up to a limit of $35,000 and (B) in respect of interest thereon, commission "and bankers' charges. On the other hand it may be read as saying that the land is charged with repayment on demand of the balance for the time being owing in respect of advances of various types, interest thereon, commission and bankers' charges up to a limit of $35,000. In their Lordships' view the words actually used – though susceptible of either construction – fit in more naturally with the former than the latter. In particular it is to be observed that if the words 'and for interest thereon etc.' do not introduce a second subject of the charge separate from the principal advanced but simply include interest, commission and bankers' charges with the principal in the specified limit then there are no words expressly charging the lands with interest on the advances as well as with the advances themselves. On that construction such a charge would have to be implied from the inclusion of interest in the limit. Moreover the fact that in the recital (which can be looked at as an aid to the construction of the operative part of a deed when it is ambiguous) the words 'with interest thereon at the rate of 12 per cent per annum' are enclosed in brackets supports the view that the limit relates only to principal advances".

It will be observed in the above case the question for determination was whether the limit set in the charge was for principal and interest or for principal only. The Federal Court, by a majority, held it was for principal and interest. The Privy Council held that it was for principal only. The question to be determined in the present case is on a different aspect. It is as to when the interest is chargeable on the construction of the charges. The bank says it is as soon as any sum from the overdraft facility is drawn; the respondent says it is on demand.

The learned trial Judge, in his judgment, found in effect that there was no dispute the bank had granted accommodation to the Company by way of fluctuating overdraft up to a maximum of $85,000.00 which represented the principal. He then said:

"The operative part of the repayment clause reads: '... do hereby promise (a) to repay the same on demand or (b) to repay the *balance* which at the date of such demand shall then be owing to the Chargee (bank) by the said Sarawak Vanguard ... including interest bank's charges and commission.' It seems that the interpretation of (b) is disputed" ...
Now, how is the word 'balance' in (b) to be interpreted? I do not think that 'balance' should be equated with the actual sum due and owing by Sarawak Vanguard to the bank otherwise the word 'balance' would be substituted by the word 'sum' to read as follows: '(b) to repay the *sum* which at the date of such demand shall then be owing to the Chargee (bank) by the said Sarawak Vanguard ...'. It is common ground that under the terms of the charges the maximum overdraft which the bank had agreed to give to the Sarawak Vanguard was a total sum of $85,000/– and it seems to me illogical that whereas the liability of the bank was limited to the extent of $85,000/– in respect of advances made to Sarawak Vanguard the respondent's liability under (b) was to be unlimited. In my opinion, the clause (b) is ambiguously worded and applying the *contra proferentem* rule the construction least favourable to the bank ought to be adopted".

The learned trial Judge then ruled that the respondent was to repay on demand the balance for the time being owing (i) in respect of advances of various types up to the total limit of $85,000.00 and (ii) in respect of interest thereon plus bank's charges and commission as from September 28, 1979, the date on which the bank made the demand for payment.

The *contra proferentem* rule referred to by the learned trial Judge is derived from the maxim *verba fortius accipiuntur contra proferentem* (words are to be interpreted strongly against him who uses them). The maxim found favour in *Throckmerton* v. *Tracy*,[7] and the House of Lords in *Neill* v. *Duke of Devonshire*[8] held to the effect that the words of a deed executed for valuable consideration, are to be construed, as far as they properly may, in favour of the grantee is subject to the general principle that the instrument must be construed in accordance with the expressed intention. There are many qualifications to this rule. (See 11 *Halsbury's* Laws of England, 3rd ed. p.394, para 642). It is to be applied only when other rules of construction fail. See *Borradaile* v. *Hunter*.[9]

Looking at the charges in the present case, we are of the view that they can be construed in accordance with their expressed intention. The operative words of the first charge are as follows:

... "in consideration of the Bank ..... granting or continuing to grant accommodation to the company ..... by way of fluctuating overdraft or otherwise up to a maximum extent of $45,000.00 do hereby *promise to re-pay the same by yearly reduction of $5,000.00 the first reduction to be made on or before April 30, 1971 and subsequent reduction to be made on April 30 of each and every calendar year thereafter* or to repay the balance which at the date of such demand shall then be owing to the Chargee by the said Company, whether in respect of cheques, bills or notes drawn accepted or endorsed by them and discounted paid or held by Chargee or for advances made to them or for liabilities incurred to the Chargee by them including interest at the rate and in the manner hereinafter mentioned calculated on daily balances with monthly rest "together with the costs of the preparation execution stamping and registration of this Charge and of the premia of fire insurance in respect of the said land and buildings and also to pay interest at the rate and in the manner hereinafter mentioned on such balance from the date of such demand until payment.

AND the Chargor hereby covenants with the Chargee that the rate of interest payable of all moneys hereby secured and all sums which shall from time to time become payable hereunder shall be determined as follows:

(1) Until the service of such a notice as is hereinafter referred to interest shall be at the rate of 12% (Twelve percentum) per annum;"

Paras (2) and (3) do not apply.

"AND as security for the above sum and interest or for all or any monies that may become payable hereunder I hereby charge to the Chargee all my undivided right title share and interest in all that parcel of land, namely" ...

The second charge contains slight variations in the repayment clause. In the first charge for the words:–

"do hereby promise to re-pay the same by yearly reduction of $5000/–, the first reduction to be made on or before April 30, 1971 and subsequent reduction to be made on April 30 of each and every calendar year thereafter or to re-pay the balance"..... in the second charge, they read:

"do hereby promise to re-pay the same on demand or to repay the balance"...

As seen, in the second charge the promise to repay is on demand. But we feel that the respondent's liability is clearly stated in the first charge whereby in consideration of the bank granting or continuing to grant accommodation to the Company by way of fluctuating overdraft up to $45,000.00, the respondent agreed –

(a) to repay the overdraft by yearly reduction of $5,000.00 on April of each year, or

(b) to repay the balance which at the date of such demand shall then be owing to the Bank by the Sarawak Vanguard Limited.

The undertaking to make yearly reduction was not fulfilled. We do not think that the omission of the words "on demand" in the first instance in the first charge is of any significance. It is clear from the subsequent requirement "or to repay the balance which at the date of such demand shall then be owing" in the first charge payment was to be made on demand, whether or not reduction has been made.

For easier reading of the repayment clause we need only set out the basic requirements of the first charge. It reads:

... "promise to re-pay the same by yearly reduction ... or to repay the balance which at the date of such demand shall then be owing to the Chargee by the said Sarawak Vanguard Limited, Kuching, whether in respect of cheques bills or notes ... or for advances ... or for liabilities incurred to the Chargee ... including interest ... calculated on daily balances with monthly rest ... and also to pay interest ... on such balance from the date of demand until payment."

For the purpose of determining whether the bank is entitled to charge interest when money is drawn or only when demand is made, we need only concern ourselves with the first charge.

There has been a lot of argument on the word "balance". It has been said in effect that it is what is left of the limit of the overdraft (principal) after reduction and if there is no reduction the principal does not change character. "Balance" in the context used in the charges, in our view, does not connote the residue of the maximum overdraft after reduction or repayment. If there is no payment towards anything, then the principal and interest is the balance at the end of the month. In *Edwards* v. *Marston* (10) by the scheme of a bill of sale the principal sum of £50/– should be repaid at the end of two years and £2.10s should be paid monthly as interest at the rate of 5 per cent per month. On the question whether the bill of sale was in accordance with the form given in the Schedule to the Bills of Sale Act, 1882, Kay, L.J. dealt with the question whether the principal could be treated as balance. He said at p.229-30:

"The sum of £2.10s. is the exact amount of the monthly interest; and I think that any one reading the document could not doubt that it represented interest only. Then, if so, what is the meaning of the other words, 'then the balance, with interest as aforesaid, is to be paid"? On the last of the specified days there would be the amount of £50/– and one month's interest to be paid. The words appear to me to indicate that amount. Why is not that a perfectly intelligible provision? Why should not the principal due be called the balance? The bill of sale is to secure two things, the principal and the interest. If the interest has all been paid, the principal might be called the balance".

It is clearly contemplated by the charges, particularly the first, that the account would be an active one with periodical payments being made. In any case, we do not consider that a balance occurs only when there is a reduction of the account, in view of the words "whether in respect of cheques bills or notes drawn accepted or endorsed by them (the Company) and discounted paid or held by the Chargee or for advances made to them or for their use or at their request or for liabilities incurred to the Chargee by them including interest ... together with costs of the preparation execution stamping and registration of the Charge and of the premia for fire insurance". By these words it must be in contemplation that if there is no payment, a balance can occur by the addition to the principal of other payments, cheques, bills, notes advances paid by the bank for the use of or at the request of the Company.

We feel fortified that the principal becomes balance as by the charges the balance owing is calculated on daily balances with monthly rest. Calculation on daily balances can only occur when any sum out of the overdraft is taken out and, if any, reduction by repayment, or addition by other charges made and including interest charged on sums drawn prior to the demand. "Demand" merely denotes the commencement of time when payment is to be made. It does not mark the commencement of the charging of interest, or for that matter other charges. The call for payment must be distinguished from chargeability. The call for payment is for the purpose of setting other courses of

action by the bank if no payment is made on what has been charged to the account.

We have been referred to the last sentence in the main paragraph which reads:

"and also to pay interest at the rate and in the manner hereinafter mentioned on such balance from the date of such demand until payment".

It is argued that this supports the contention that interest is chargeable from the date of demand. We are, however, of the view that this sentence denotes an additional obligation having regard to the word "also". The additional obligation to pay interest at the agreed rate does not cease with the making of the demand, but it continues until payment is completed. This being so, it follows that interest is chargeable before the demand, i.e. when money is drawn from the overdraft facility. We are also of the view that when the charges give the bank the right to demand payment of the sum or the balance which shall then be owing whether in respect of other charges, including interest, they envisage the existence of these items before the demand. We cannot see how it can be said that the interest should only come to life with the demand.

It has been urged that the words "including interest" in the repayment clause does not mean interest in addition to the balance but that it forms part of the balance. *Reynolds* v. *Commissioner of Income Tax for Trinidad and Tobago,*(11) cited as authority, says that "including" is generally used to enlarge the meaning of the preceding words. On this very authority, in our view, the enlargement by the addition of interest is to cover all preceding items mentioned in the repayment clause capable of bearing interest and expended by the bank for use of or at the request of the Company, i.e. overdraft, balance, charges, bills, notes, advances, liabilities, registration costs, stamping and fire insurance premia.

Lastly, there is the interest clause in the charges which reads –

"AND the chargor hereby covenants with the Chargee that the rate of interest payable on all moneys hereby secured and all sums which shall from time to time become payable hereunder shall be determined as follows:
(1) ... 12% per annum". ...

This clause gives the whole tenor that interest becomes payable on sums from the time they are drawn and sums become payable when they are drawn.

For the foregoing reasons we are of the view that the respondent is responsible to pay the bank for –

(i) principal sum under the charges ... $85,000.000
(ii) interest at 12% per annum calculated on daily balances with monthly rest from the date of utilisation of overdraft facilities by the company; and
(iii) interest from date of demand till date of settlement.

This matter is referred back to the trial court as it is indicated in the notes that no argument has yet been heard as to the form of the Order.

For reasons given we allow the appeal with costs. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Reddi & Co.*

NUNIS v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdoolcader & Gunn Chit Tuan JJ.) April 12, 1982]

[Penang – Federal Court Criminal Application No. 2 of 1982]

Criminal Law and Procedure – Corrupt practice – Pecuniary or other advantage – Meaning of "other advantage" – Emergency (Essential Powers) Ordinance, 1970, s. 2.

Criminal Law and Procedure – Reference to Federal Court – Whether question one of public interest – Construction of words in statute – Emergency (Essential Powers) Ordinance, 1970, s. 2 – Courts of Judicature Act, 1964, s. 66.

In this case the applicant, the Penang State Fire Chief recommended to the Chairman, Lembaga Pengurus Kerajaan Tempatan, the purchase of certain equipment from a firm wholly owned by his brother in law at a price higher than the price for which they could be obtained from another firm. He was charged under section 2(1) of the Emergency (Essential Powers) Ordinance, 1970 but was acquitted by the President of the Sessions Court, Penang. On appeal, Abdul Hamid F.J. set aside the order of acquittal and substituted an order of conviction and sentenced the applicant to two years' imprisonment. He held (i) the words "other advantage" should be given a very wide meaning on the facts of each case. The other advantage need not necessarily be pecuniary in nature; (ii) it was clear from the evidence in this case that the applicant abused his public position when he assisted or gave aid to his brother-in-law. It was beneficial to him personally that by so doing he could provide benefits to close members of his family; (iii) the learned President therefore erred in law when he acquitted the applicant and the appeal must be allowed and the order of acquittal set aside. The applicant applied for leave to refer a question of law to the Federal Court as to the construction of the words "other advantage" in section 2(2) of the Emergency (Essential Powers) Ordinance, 1970 and in particular whether it refers only to some form of property whether moveable or immoveable, corporeal or incorporeal.

Held, dismissing the application: the construction of the words in question in the statutory provision for which leave is sought under section 66 of the Courts of Judicature Act, 1964, would be a mere matter of applying the relevant provision to the factual circumstances of any particular case. These must of necessity vary from case to case and therefore the question raised is not one of law of public interest.

Cases referred to:

(1) *Nothman* v. *Barnet London Borough Council* [1978] 1 W.L.R. 220.
(2) *Public Prosecutor* v. *Datuk Tan Cheng Swee & Ors.* [1979] 1 M.L.J. 166, 178.
(3) *Haji Abdul Ghani bin Ishak & Anor* v. *Public Prosecutor* [1981] 2 M.L.J. 230.
(4) *A. Ragunathan* v. *Pendakwa Raya* [1982] 1 M.L.J. 139.

HIGH COURT

A. Khalid bin A. Manaff (Deputy Public Prosecutor) for the appellant

K. Balasundram for the respondent.

Cur. Adv. Vult.

Abdul Hamid F. J.: The Public Prosecutor is dissatisfied with the decision of the President Sessions Court Penang who acquitted and discharged the respondent, Francis Philip Nunis, on the following charge –

"That you on 12.7.74 at the Lembaga Pengurus Kerajaan Tempatan Pulau Pinang at Jalan Padang Kota Lama, in the District of George-